

## Message Text

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ORIGIN STR-07

INFO OCT-01 EUR-12 IO-13 ISO-00 AGRE-00 CEA-01 CIAE-00  
COME-00 DODE-00 EB-08 FRB-03 H-01 INR-10 INT-05  
L-03 LAB-04 NSAE-00 NSC-05 PA-01 CTME-00 AID-05  
SS-15 ITC-01 TRSE-00 ICA-11 SP-02 SOE-02 OMB-01  
DOE-15 /126 R

DRAFTED BY STR:MPOMERANZ:LMC

APPROVED BY STR:WKELLY

STR:RHEIMLICH

STATE:JSPIRO

TREASURY:JSCHOTT

AGRI:(INFORMED)

LABOR:IKRAMER/RDOBSON

DOD:RBOOTON

OMB:LHAUGH

COMMERCE:DSCHLECHTY/MPRUIETT

-----015932 220305Z /61

P 220012Z JUN 78

FM SECSTATE WASHDC

TO USMISSION GENEVA PRIORITY

INFO AMEMBASSY BRUSSELS PRIORITY

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MTN

E.O. 11652: N/A

TAGS: ETRD, MTN, EEC

SUBJECT: GOVERNMENT PROCUREMENT - JUNE 23 BILATERAL WITH  
EC

REF: GENEVA 9123

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1. FOLLOWING IS TPSC APPROVED INSTRUCTIONS FOR SUBJECT  
BILATERALS.

2. THE FORMULATION PROPOSED BY DERISBOURG ON EX POSTE  
PUBLICITY (PARA. 3 OF REFTEL) COULD PROVIDE ACCEPTABLE  
COMPROMISE PROVIDED THE EC CAN PUT FORWARD A DEFINITION

OR NORMATIVE RULE AGREEABLE TO THE U.S. WHICH WOULD SPELL OUT WHAT WOULD "PREJUDICE COMPETITION IN FUTURE TENDERS". WITHOUT SUCH A DEFINITION THE DISPUTE SETTLEMENT IS NOT LIKELY TO RESOLVE ANY CONTROVERSY AND SO THE PROTECTION WOULD BE ILLUSORY.

3. WITH REGARD TO EX ANTE PUBLICITY, WE SHARE DEL VIEW OF WELCOMING EC CHANGE OF POSITION AND ALSO RECOGNIZE NEED FOR REDRAFTING LANGUAGE TO REFLECT THIS. WE HAVE NO PROBLEMS WITH DROPPING "ALL" IN LAST SENTENCE OF PARA. 6.

THE AGREED CHANGE IN PARA. 3 (A) WILL HOWEVER REQUIRE THAT WE DROP THE INTRODUCTORY PHRASE, "NOTWITHSTANDING THE PROVISIONS OF THE PRECEDING SUBPARAGRAPH" IN SUBPARA. 3(B). THAT RELATIONSHIP BETWEEN THE TWO SUBPARAS NO LONGER EXISTS.

4. ALTHOUGH WE ARE ENCOURAGED THAT THE COMMISSION HAS PROPOSED A \$100,000 COMPROMISE THRESHOLD, THE U.S. IS NOT PREPARED TO COMMIT ON A THRESHOLD LEVEL UNTIL WE HAVE A CLEARER PICTURE OF CODE COVERAGE. IF THE EC WERE TO INCLUDE LARGE CONTRACT LEVEL ENTITIES SUCH AS PTT'S, POWER GENERATING ENTITIES, AND TRANSPORTATION SERVICES, U.S. COULD MORE EASILY ACCEPT \$100,000 THRESHOLD. IF THOSE ENTITIES ARE EXCLUDED HOWEVER WE WILL LOSE MUCH OF OUR INDUSTRIAL SUPPORT FOR THE CODE, AND THAT SUPPORT WHICH LIMITED OFFICIAL USE

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IS LEFT WILL COME FROM SECTORS SUCH AS SCIENTIFIC INSTRUMENTS, WHOSE GOVERNMENT SALES FREQUENTLY FALL BELOW \$100,000. WE CONTINUE TO BE CONCERNED ABOUT NEED TO DEFEND ANY THRESHOLD LEVEL AND THEREFORE URGE DEL TO MAKE EVERY EFFORT TO ELICIT FROM OTHERS WHATEVER UPDATING CAN BE OBTAINED OF OECD DATA AS TO SIZE OF CONTRACTS. DOD DATA (THE LARGEST PART OF U.S. PROCUREMENTS) ON CONTRACT LEVELS IS AVAILABLE TO OTHER DELS AND SHOULD SERVE TO ENCOURAGE THEM TO RESPOND TO OUR NEEDS IF AT ALL POSSIBLE.

5. COVERAGE IS, OF COURSE, STILL A WIDE OPEN SUBJECT. WE WOULD THEREFORE LIKE TO KEEP OUR OPTIONS OPEN ON A "BEST ENDEAVORS" CLAUSE PARTICULARLY IN THE LIGHT OF SWISS AND GERMAN COVERAGE (CANTONS AND LANDER). THE DEL MAY WANT TO HAVE IN HAND AN ALTERNATIVE WORDING SUCH AS THE FOLLOWING: "IN CASES WHERE PUBLIC PURCHASING ENTITIES ARE NOT LISTED IN ANNEX, GOVERNMENTS SHALL TAKE ALL APPROPRIATE MEASURES WITH A VIEW TO MAKING SUCH ENTITIES APPLY IN THEIR PURCHASES THE PRINCIPLE OF NON DISCRIMINATION AND TAKE THE PROVISIONS OF THIS INSTRUMENT INTO ACCOUNT TO THE MAXIMUM POSSIBLE EXTENT." GIVEN THE STATE OF PLAY ON ENTITY COVERAGE AND THE DISTINCT LIKELIHOOD THAT INITIAL

COVERAGE WILL BE CONSIDERABLY LESS THAN WE WOULD HAVE EARLIER ANTICIPATED, WE MUST RECOGNIZE THAT OUR POSITION ON A NORMATIVE RULE IS TO SOME EXTENT OVERTAKEN. CONSEQUENTLY WE MUST THINK OF A NEW FORMULATION OF THE NORMATIVE RULE WHICH MAINTAINS THE RULE FOR FUTURE PRESSURE WHILE RECOGNIZING THAT, INITIALLY, IT IS EQUATED WITH WHAT IS ON THE ENTITY LISTS. ADDITIONALLY THE NEW FORMULATION MUST ENCOMPASS SUCCESSOR ENTITIES WITHOUT NEED FOR RENEGOTIATION. WE THEREFORE PROPOSE THE FOLLOWING TEXT TO BE USED BY YOU AT SUCH TIME AS YOU CONSIDER IT APPROPRIATE.

THIS CODE IS INTENDED TO APPLY TO THE NATIONAL GOVERNMENT AGENCIES AND ENTITIES UNDER THE DIRECT OR SUB-LIMITED OFFICIAL USE

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STANTIAL CONTROL OF SIGNATORIES WITH RESPECT TO THEIR PROCUREMENT PROCEDURES AND PRACTICES. UNTIL FULL COVERAGE OF SUCH ENTITIES IS ACHIEVED AT SOME LATER DATE, THE COVERAGE OF THE RULE WOULD BE CONFINED TO THOSE ENTITIES IN ANNEX (BLANK) AND THEIR SUCCESSORS."

6. WE CERTAINLY ARE SYMPATHETIC TO THE COMMISSION CONCERNING "SENSITIVE PRODUCTS" PURCHASED BY DEFENSE MINISTRIES. COUPLING THIS WITH A NORMATIVE RULE ON NATIONAL SECURITY DOES HOWEVER GIVE US A NUMBER OF REAL PROBLEMS. THE BEST FORMULATION YET ACHIEVED OF SUCH A NORMATIVE RULE WILL STILL LEAVE GRAY AREAS WHERE THERE MAY BE LEGITIMATE ARGUMENT AS TO WHETHER AN ITEM IS OR IS NOT OF A NATIONAL SECURITY ASPECT. WHAT THE COMMISSION IS PROPOSING IS TO EXEMPT FROM THE CODES, UNDER THE NATIONAL SECURITY PROVISIONS, A GROUP OF PRODUCTS, MANY OF WHICH ARE CLEARLY NOT OF A NATIONAL SECURITY ASPECT. THIS PUTS THE NORMATIVE RULE INTO QUESTION, IN ADDITION TO OPENING A PANDORA BOX AS TO WHAT WILL BE ON THAT LIST, WHETHER A NEGATIVE OR POSITIVE ONE. FOR THESE REASONS WE CONTINUE TO CONSIDER THAT THE PROBLEM WOULD BE BETTER HANDLED AS PART OF THE COVERAGE QUESTION. OUR DOD IS REQUIRED TO PURCHASE FROM U.S. SOURCES ONLY, ITS NEEDS FOR TEXTILES, CLOTHING (INCLUDING GLOVES AND SHOES), SUSTENCE, VEHICLES, SHIPS, AND SPECIALTY METALS. WON'T THE EC PROBLEMS BE RESOLVED IF WE MAINTAIN THESE, AS PART OF OUR COVERAGE RESULTS, WITH THE UNDERSTANDING THAT OTHER PARTICIPANTS, IF THEIR COVERAGE IS OTHERWISE SUFFICIENT, COULD WITHHOLD THESE ITEMS FROM THEIR DEFENSE PURCHASES SUBJECT TO CODE? SOME SUCH ARRANGEMENT AS THIS SHOULD BE ACHIEVABLE AND THEREBY AVOID THE KIND OF LOGROLLING INVOLVED IN ANY KIND OF LIST FORMULATION PLUS THE HAZARDS TO THE NORMATIVE RULE.

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7. WE ARE MOST INTERESTED IN THE COMMISSION'S SUGGESTION ON OFFSETS CONTAINED IN GENEVA'S 8821. WE ASSUME DEL IS STILL ENDEAVORING TO DETERMINE EC UNDERSTANDING OF LANGUAGE "PASSED IN THE PRINCIPLE OF NON-DISCRIMINATION". IN THE MEANTIME WE ARE ENCOURAGED ENOUGH BY THE SEEMING DIRECTION OF THE COMMISSION TO SUGGEST THE FOLLOWING FORMULATION FOR THE DEL TO CONSIDER IN THE LIGHT OF OUR OWN ISAC ADVICE:

"L4(I). IN NO CASE SHALL THE AWARD OF A CONTRACT BE MADE ON THE CONDITION THAT THE SUPPLIER LICENSE THE TECHNOLOGY INVOLVED, OR ANY OTHER CONDITION INCONSISTENT

WITH THE PROVISIONS OF NATIONAL TREATMENT AND NON-DISCRIMINATION. IT IS RECOGNIZED, HOWEVER, THAT, IN RARE CASES, GOVERNMENTS MAY HAVE TO CONDITION AN AWARD ON THE GRANT OF AN OFFSET. IN SUCH CASES SIGNATORY GOVERNMENTS WILL MINIMIZE THE SIZE OF SUCH OFFSETS. VANCE

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